

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 31, 2007 Session

JEREMY ROBBINS

v.

REAGAN FARR,
COMMISSIONER OF REVENUE FOR THE STATE OF TENNESSEE¹

An Appeal from the Chancery Court for Davidson County
No. 05-2363-IV Richard H. Dinkins, Chancellor

No. M2006-01730-COA-R3-CV - Filed August 11, 2009

This is a constitutional challenge to Tennessee’s “Drug Tax.” The petitioner sought, *inter alia*, a declaratory judgment that the tax assessed against him for being in possession of untaxed, unauthorized substances was unconstitutional. The trial court agreed and granted summary judgment to the petitioner, holding that the tax is unconstitutional. The Commissioner of Revenue appeals. After initially holding the appeal in abeyance, we now affirm in light of the holding of the Tennessee Supreme Court in *Waters v. Farr*, No. E2006-02225-SC-R11-CV, 2009 WL 2214185 (Tenn. July 24, 2009).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, J., and DONALD P. HARRIS, SR. J., joined.

Robert E. Cooper, Jr., Attorney General & Reporter, Michael E. Moore, Solicitor General, and Brad H. Buchanan, Assistant Attorney General, for the appellant, Reagan Farr, Commissioner of Revenue for the State of Tennessee.

Richard L. Holcomb, Knoxville, Tennessee, for the appellee, Jeremy Robbins.

¹In accordance with Tennessee Rule of Appellate Procedure 19(c), Reagan Farr, the current Commissioner of Revenue, has been substituted as a party in this appeal in place of his predecessor, Loren L. Chumley.

OPINION

On March 4, 2005, Plaintiff/Appellee Jeremy Robbins (“Robbins”) was arrested by federal authorities pursuant to an indictment charging him and a co-defendant with possession of marijuana with intent to distribute. Although Robbins’ indictment was brought in federal court, state law enforcement authorities were also involved in the investigation. As a result, Tennessee’s Fourth Judicial District Drug and Violent Crime Task Force provided the Commissioner of Revenue for the State of Tennessee (“Commissioner”)² with a “Registration and Report for Taxation of Unauthorized Substances” (“the Report”). The Report recited the amount of marijuana seized and the identity of the individuals arrested in conjunction with the seizure, including Robbins. The Report indicated that some 606 pounds of marijuana belonging to Robbins was seized.³

On April 15, 2005, based on the information in the Report, the Commissioner assessed a tax against Robbins pursuant to Tennessee’s tax on being “found in possession of untaxed, unauthorized substances,” codified at Tennessee Code Annotated § 67-4-2801, *et seq.* (“Drug Tax”), in the amount of \$1,174,440.05.⁴ (At 18). The “Drug Tax” is an excise tax on cocaine and other specified unauthorized substances possessed by a “dealer,” a term defined in the statute to include “[a] person who actually or constructively possesses more than forty-two and one-half (42.5) grams of marijuana” Tenn. Code Ann. § 67-4-2802(3)(A) (2006). On July 15, 2005, after an informal taxpayer conference with Robbins, the administrative hearing officer issued a letter ruling upholding the assessment.

On September 16, 2005, Robbins filed in the trial court below a “Complaint for Declaratory Judgment and Injunctive Relief,” challenging the constitutionality of the Tennessee Drug Tax on six grounds: (1) the tax violates constitutional protections against double jeopardy; (2) imposition of the tax violates various constitutional due process protections; (3) the tax is unconstitutional because it is arbitrary and capricious in its classification; (4) the reach of the tax is beyond the authority of the legislature; (5) it imposes obligations with which it is impossible to comply; and (6) the tax violates constitutional protections against self-incrimination. Robbins also sought a mandatory injunction to prohibit the Commissioner from enforcing or collecting the assessment.

The parties filed cross motions for summary judgment. After a hearing, the trial court issued an order denying the Commissioner’s motion for summary judgment and granting summary judgment in favor of Robbins. As the basis for its decision, the trial court held that the Drug Tax was unconstitutional. Initially, the trial court held that the Tennessee legislature had the authority to enact the excise tax on unauthorized substances. It concluded, however, that the Drug Tax was not purely a tax statute but was penal in nature; consequently, it held that constitutional protections

² At the time, the Commissioner of Revenue was Loren L. Chumley.

³ Six (6) pounds of marijuana was seized at Robbins’ home, and 600 pounds was seized at the home of Steve Shipley. Robbins admitted, however, that the 600 pounds found at Shipley’s residence belonged to Robbins.

⁴ This amount was comprised of a tax liability of \$1,058,400, a penalty of \$105,840, and interest of \$10,200.05.

attendant to criminal proceedings should apply. The trial court further held that, although the statute violates the double jeopardy provisions of the United States and Tennessee constitutions to the extent that it could be employed against a dealer otherwise subject to a state prosecution, Robbins' double jeopardy rights were not violated in this particular case because Robbins was subject only to a federal prosecution, not a State prosecution. It also concluded that, because of the penal nature of the tax, the statute failed to ensure the constitutional guarantees of due process. Further, the trial court concluded that the "confidentiality" provision contained in Tennessee Code Annotated § 67-4-2808 violates the privilege against compulsory self-incrimination, because it does not sufficiently insulate the taxpayer who seeks to comply with the statute from incriminating himself. Finally, the trial court determined that the Drug Tax is not arbitrary in its classification, and it is not unconstitutional based on impossibility of performance. The Commissioner filed a motion to alter or amend requesting that the trial court address the issues of attorney's fees and expenses. The trial court reserved ruling on those issues and made its order final in accordance with Rule 54.02 of the Tennessee Rules of Civil Procedure. From this order, the Commissioner now appeals, challenging the trial court's conclusion on several grounds and arguing that the Drug Tax is constitutional.

On January 30, 2008, this Court entered an order holding this appeal in abeyance pending the outcome in the appeal to the Tennessee Supreme Court of *Waters v. Chumley*, No. E2006-02225-COA-R3-CV, 2007 WL 2500370 (Tenn. Ct. App. Aug. 15, 2007). On July 24, 2009, the Supreme Court issued its decision affirming the intermediate appellate court's decision in *Waters*. *See Waters v. Farr*, No. E2006-02225-SC-R11-CV, 2009 WL 2214185 (Tenn. July 24, 2009).⁵ In its decision, the Supreme Court held that the tax on unauthorized substances does not violate the constitutional protections against compulsory self-incrimination and double jeopardy, nor does it abridge the guarantee of procedural due process. The Court nevertheless held the tax to be unconstitutional because it could not be classified as either a tax on merchants and peddlers, or a tax on a privilege, as authorized by the Tennessee Constitution. *Waters*, 2009 WL 2214185, at *30. Specifically, the Court found that the Drug Tax imposed on "dealers" cannot be deemed to be a tax on merchants and peddlers, because "dealers" is defined in terms of "possession" of illegal substances, not possession with intent to sell. In other words, the tax is imposed upon the possession, not the merchandising of unauthorized substances, and therefore is not a tax on "merchants and peddlers." *Id.* at *23-26. The tax could not be characterized as a tax on a privilege, because possessing illegal drugs is an activity that the Legislature has previously declared to be a crime, not a privilege. *Id.* at *26-29. Thus, the Supreme Court held the Drug Tax to be unconstitutional, albeit on grounds different from the grounds relied on by the trial court below in this case. Therefore, in light of the holding in *Waters*, we affirm the trial court's conclusion that the Drug Tax is unconstitutional and the grant of summary judgment in favor of Robbins.

⁵ As in this case, Reagan Farr, the current Commissioner of Revenue, was substituted as a party in this appeal in place of his predecessor, Loren L. Chumley, pursuant to Rule 19(c) of the Rules of Appellate Procedure.

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellant Reagan Farr, Commissioner of Revenue for the State of Tennessee, and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE